In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS, and CONTRA COSTA COUNTY COMMUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, and THE GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

I. OPINIONS OF THE COURT BELOW.

The decision and opinions of the District Court are reported at 150 F. Supp. 619 and are set forth in the

printed record herein at pages 111-18 (majority opinion), 119-24 (concurring and dissenting opinion), and 124-5 (judgment). The decision of the Interstate Commerce Commission appears in the printed record at pages 8-41.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED.

This action was commenced in the Court below to set aside an order of the Interstate Commerce Commission which authorized Pacific Greyhound Lines, a common carrier of passengers to transfer certain of its local bus operations in the San Francisco Bay Area to its newly created subsidiary, Golden Gate Transit Lines, without the necessity of obtaining the approval of the Public Utilities Commission of the State of California, under whose jurisdiction substantially all the operations are conducted. The District Court had jurisdiction under Sections 2321-5, 2284, 1366, and 1398, of Title 28 of the United States Code, and pursuant thereto a three-judge Court was convened for the purpose of hearing the matter (R. 50-51).

The judgment of the District Court sustaining the order of the Interstate Commerce Commission was dated and entered May 3, 1957 (R. 124-5). The notice of appeal was filed with the Clerk of the District Court on May 29, 1957 (R. 126-8). On June 27, 1957, the time for docketing the case and filing the record thereof with the Clerk of this Court was enlarged to and including September 2, 1957 (R. 130). The order of this Court noting probable jurisdiction was entered

on November 12, 1957 (R. 131), ... U.S. ....., 78 S.Ct. 116. This Court has jurisdiction pursuant to Sections 1253 and 2101 of Title 28, and Section 45 of Title 49 of the United States Code.

III. STATUTES INVOLVED.

The case involves the meaning and effect of the following Sections of the Interstate Commerce Act and of Rule 15(a) of the Federal Rules of Civil Procedure:

A. Section 5(2)(a), (4), (11), and (13) of the Interstate Commerce Act (U.S. Code, Title 49, Section 5(2)(a), (4), (11), and (13)), reading as follows:

"Sec. 5. * * *

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)——

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a

carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

* * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

* * *

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a cor-

porate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

* * *

"(13) As used in paragraphs (2) to (12), inclusive, the term 'carrier' means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III."

B. Sections 203(a)(14) and (16) and 212(b) of the Interstate Commerce Act (U.S. Code, Title 49, Sections 303(a)(14) and (16) and 312(b)), reading as follows:

"Sec 203(a) As used in this part—

* * *

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

* * *

"(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

* * *

"Sec. 212. * * *

"(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

C. Rule 15(a), Federal Rules of Civil Procedure, reading as follows:

> "(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

IV. QUESTIONS PRESENTED.

A. Does the exclusive and plenary power of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act to authorize transfer of both interstate and intrastate operating rights of carriers in connection with mergers, consolidations, and acquisitions of common control of carriers, extend to a proposed split-up of motor carrier operating rights under which an existing carrier would transfer predominantly intrastate operations to a newly-created subsidiary not yet performing any operations; or does the transfer of operating rights under such a split-up fall under Section 212(b) of the Interstate

Commerce Act with respect to the interstate operations and under the jurisdiction of the appropriate state agency with respect to the intrastate operations?

B. Where the original complaint raised only the legal question of the jurisdiction of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act to issue the order under review, was it an abuse of discretion for the lower Court to deny appellants' motion, made at the time of argument of that legal question, to amend the complaint so as to present the additional questions of whether there was sufficient evidence to support the findings of the Interstate Commerce Commission and whether the Interstate Commerce Commission abused its discretion in denying appellants' petition for rehearing, where the failure to raise the additional grounds in the original complaint was based on a judgment decision of the attorney and not on inadvertence, mistake, or neglect, and where there was no unreasonable delay or prejudice to the other parties?

V. STATEMENT OF THE CASE.

This case involves an attempt by a large motor coach operator conducting extensive bus operations in both interstate and intrastate commerce to transfer its suburban operations in the San Francisco Bay Area to a subsidiary corporation organized specifically for that purpose, without obtaining the approval of the Public Utilities Commission of the State of California.

On February 8, 1954, Pacific Greyhound Lines (hereinafter called Pacific Greyhound), Golden Gate Transit Lines (hereinafter called Golden Gate), and The Greyhound Corporation filed applications with the Interstate Commerce Commission seeking authority under Section 5(2) of the Interstate Commerce Act for the transfer to Golden Gate of certain passenger bus operations conducted by Pacific Greyhound in the San Francisco Bay Area in exchange for the issuance to Pacific Greyhound of all of Golden Gate's outstanding capital stock (R. 9). The Greyhound Corporation was a party to the application, because it controlled Pacific Greyhound through ownership of a majority of the latter's outstanding capital stock (R. 9).

Golden Gate was incorporated on May 7, 1953. It has engaged in no business activities and has not at any time been a motor carrier (R. 11-12).

Pacific Greyhound operates as a motor common carrier of passengers pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission between points in California, Oregon, Nevada, Utah, Texas, Arizona, and New Mexico (R. 10). It also conducts extensive intrastate operations in California under Certificates of Public Convenience and Necessity issued by the Public Utilities Commission of that State (R. 11).

The operations which this case involves consist of suburban bus service between San Francisco and the area within a radius of 25 to 30 miles extending to Marin County on the north, Contra Costa County on

the east, and the Peninsula area on the south (R. 11). In terms of revenue, only 5.7% of the traffic involved in these local operations consists of passengers utilizing the local service as a part of an interstate trip, and the remaining 94.3% is intrastate traffic consisting largely of the transportation of commuters between their offices in San Francisco and their residences in the outlying areas (R. 29, 11).

After the hearing officer had recommended denial of the applications, the Interstate Commerce Commission reviewed the matter and issued its order on July 6, 1955, granting the applications and authorizing the transfer under Section 5 (R. 8-9, 40-41). If Section 5 applies, the transaction may be consummated without obtaining the approval of the California Public Utilities Commission.

The admitted purpose of Pacific Greyhound, in seeking to transfer its San Francisco Bay Area operations to a separate corporation, is to escape the rate-making practices and policies of the California Public Utilities Commission (R. 25), which has held that Pacific Greyhound's applications for increases in rates in these local operations should be determined in the light of Pacific Greyhound's total earnings from all of its intrastate operations in California. *Re Pacific Greyhound Lines*, 50 Cal. P.U.C. 650 (1951); *re Pacific Greyhound Lines*, 55 P.U.C. 641 (1957).

Under the terms of the transaction, as outlined in the applications, Pacific Greyhound would transfer to Golden Gate its operating rights in the area in question, $150,000.00 in cash, 138 transit-type buses,

and Pacific Greyhound's equity in 52 buses recently purchased under conditional sales contracts, together with certain miscellaneous property, and in exchange Golden Gate would issue to Pacific Greyhound all of its capital stock consisting of 300,000 shares of $1.00 par value common, would assume the outstanding indebtedness on the 52 buses, and would be indebted to Pacific Greyhound on an open account basis for the difference between the net book value of the buses and the amount of the outstanding indebtedness thereon at the date of consummation (R. 12). As of April 1, 1954, just prior to the public hearing before the Interstate Commerce Commission examiner, the outstanding indebtedness on the 52 buses was $982,566.00, on which $163,761.00 was due within one year and the balance of $818,805.00 was payable in the succeeding five years; and the open account indebtedness representing Pacific Greyhound's book equity in the new buses would have been $173,394.00 as of that date (R. 17). A *pro forma* income statement, submitted by Pacific Greyhound and Golden Gate at the public hearing, showed that if Golden Gate had been conducting the operations in question during the year 1953 under the fares existing at that time, it would have incurred a net operating loss of $234,300.00 (R. 17). The Interstate Commerce Commission found that the proposed transaction was consistent with the public interest within the meaning of Section 5(2)(a) and authorized its consummation, with the condition, however, that the amount of cash payment from Pacific Greyhound to Golden Gate should be $250,000.00, instead of $150,000.00 (R. 31).

A petition for rehearing and reconsideration (R. 79-87) was filed with the Interstate Commerce Commission by appellants on August 11, 1955, and was denied by the Commission on September 19, 1955 (R. 5). In this petition, appellants sought permission to present evidence that on July 28, 1955, the Vice-President of Pacific Greyhound gave testimony before the California Public Utilities Commission, in connection with the inclusion of working capital in the rate base for purposes of determining fair and reasonable rates, that the necessary working capital for the operations in question consisted of an amount equal to the average monthly cash expenditures, which, as applied to this case, would amount to $321,183.00.

The petition pointed out that this testimony was contrary to the contention of Pacific Greyhound in the Interstate Commerce Commission hearing that $150,000.00 would be adequate working capital, and to the conclusion of the Interstate Commerce Commission that $250,000.00 would provide adequate working capital. A verbatim transcript of the testimony of Pacific Greyhound's Vice-President before the California Public Utilities Commission was attached to the petition for rehearing (R. 85-7). The petition for rehearing also took exception to the finding that the proposed transfer would be consistent with the public interest, to the finding that the cash investment of $250,000.00 in Golden Gate would provide it with adequate working capital, and to the conclusion that the proposed transaction was within the scope of Section 5 (R. 80).

On October 18, 1955, appellants filed a complaint in the United States District Court for the Northern District of California asking the Court to annul and set aside the order of the Interstate Commerce Commission (R. 1-7). The single ground on which the complaint challenged the validity of the order was that the proposed transactions did not come within the scope of Section 5 of the Interstate Commerce Act (R. 6-7).

Certain labor unions representing employees of Pacific Greyhound, who had appeared as protestants in the Interstate Commerce Commission proceeding, were joined with appellants as parties plaintiff in that action (R. 1-2). However, on the basis of an agreement reached between the labor unions and Pacific Greyhound and Golden Gate, the complaint was dismissed with prejudice as to the labor union plaintiffs on February 23, 1956 (R. 72-4). On that same day, while the Court was hearing arguments on appellees' motions for judgment on the pleadings and for dismissal of the complaint, appellants asked for permission to amend the complaint (R. 124, 117); and thereafter, on February 28, 1956, appellants filed a written motion for leave to amend the complaint, as well as the proposed amendment (R. 74-87). The motion to amend was argued on April 20, 1956 (R. 124). On May 3, 1957, the Court entered its judgment dismissing the complaint and denying the motion for leave to amend the complaint (R. 124-5), in accordance with the majority opinion of the Court dated April 12, 1957 (R. 111-18).

The proposed amendment to the complaint challenged the action of the Interstate Commerce Commission on two additional grounds, namely, (1) that the finding of the Interstate Commerce Commission that the proposed transactions were consistent with the public interest was not supported by substantial evidence, but was in fact contrary to the evidence for various reasons specified in the proposed amendment (R. 75-7), and (2) that the Interstate Commerce Commission abused its discretion in denying appellants' petition for rehearing and reconsideration, in view of the testimony regarding working capital already mentioned above which the Vice-President of Pacific Greyhound had given before the California Public Utilities Commission a few days after the Interstate Commerce Commission order had been isued (R. 77-8).

The proposed amendment alleged that there was no substantial evidence to support the finding of the Interstate Commerce Commission that the negotiation of employment contracts with the union had in the past been made difficult because the terms applicable to local drivers had been embraced in a single contract applicable to intercity drivers as well, and that such difficulty would be alleviated by the transfer of the local operations in question and the consequent separation of labor negotiations for the two classes of employees. The proposed amendment alleged that, on the contrary, and notwithstanding said finding, Pacific Greyhound and Golden Gate on February 21, 1956, entered into agreements with the unions providing that if the proposed transactions should be con-

summated the employees of Pacific Greyhound and Golden Gate would be covered by the same employment contracts, and that employees of Pacific Greyhound who transferred to Golden Gate would have the privilege to transfer back to Pacific Greyhound without loss of seniority (R. 76-77).

The proposed amendment also alleged that there was no substantial evidence to support a finding that Golden Gate would be financially able to perform the operations in question or that a cash investment of only $250,000.00 would be sufficient to protect the public against discontinuance of the operations (R. 75); that there was no substantial evidence to support the finding or implied finding that the intrastate operations in question constitute a burden on the interstate operations of Pacific Greyhound, but, on the contrary, the evidence affirmatively showed that any losses on the operations in question have been fully offset by Pacific Greyhound's revenue from its other intrastate operations in California and that Pacific Greyhound's total intrastate operations in California have been conducted at rates which have returned a reasonable profit (R. 75-6); that there was no substantial evidence to support the implied finding that the California Public Utilities Commission has determined Pacific Greyhound's fares for the operations in question "in the light of Pacific's system-wide operations and revenues" (R. 76); that there was no substantial evidence to support the implied finding that the alleged managerial efficiencies which would result from the proposed transactions could not be

achieved as well by creating a separate operating division as by creating a separate subsidiary corporation (R. 77); and that there was no substantial evidence to support the finding that there has been a decline in Pacific Greyhound's long-haul traffic (R. 77).

With regard to the legal question as to the scope and meaning of Section 5(2) of the Interstate Commerce Act, the Court below held that the proposed transaction fell within that portion of Section 5(2)(a) which reads "or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise", and that for purposes of this section Golden Gate should be considered a carrier, even though it would not acquire carrier status until after the transaction had been consummated (R. 112-13).

With regard to the motion of appellants for permission to amend the complaint, the District Court held that, notwithstanding the liberal provisions for amendment contained in Rule 15(a) of the Federal Rules of Civil Procedure, the power to amend "should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (R. 117-8). One judge dissented, on the ground that the public importance of the matter called for the exercise of the liberal policy of Rule 15(a) to permit a full judicial review of the entire matter (R. 122-3).

VI. SUMMARY OF ARGUMENT.

A. The scope of Section 5(2) of the Interstate Commerce Act.

The Congressional purpose in the enactment of Section 5(2) in 1940 was to facilitate mergers, consolidations, and unifications, as a means of rescuing the transportation industry from a serious economic situation. One-third of the railroad mileage was already in bankruptcy, and another third was teetering at the brink. The requirement in the 1920 Transportation Act that the Interstate Commerce Commission take the initiative in proposing consolidation plans had not borne fruit.

In this setting, Congress decided, in 1940, to encourage voluntary consolidations, subject to the approval of the Interstate Commerce Commission. To facilitate the consummation of such plans, Congress gave the Interstate Commerce Commission plenary jurisdiction, by providing in Section 5(11) that a transaction approved by the Interstate Commerce Commission under Section 5 could be put into effect without invoking any approval under state authority.

Although the legislative history shows that the Congressional concern went primarily to railroads, Section 5 was made applicable to motor and water carriers as well, since they were brought under the Transportation Act of 1940.

The purpose in dispensing with the need for state approval was obviously that of avoiding the delay and other complications which might result if approval had to be obtained from every state in which

each of the participating carriers operated. Section 5(2) was never intended to apply to the split-up of a single carrier. Its purpose was to strengthen by unification or merger, not to weaken by division. The language of the statute clearly shows this. In every instance it refers either to mergers and consolidations of carriers, or to acquisition of one carrier's properties by another, or to the bringing of two or more carriers under a common control. The legislative history likewise shows that Congress had consolidations and mergers in mind, not split-ups.

What Pacific Greyhound seeks to do here is to apply the statutory language in such a way as to accomplish the very opposite of the purpose for which Section 5(2) was enacted, namely, to amputate a very important but economically insecure branch of its service and to let it flounder alone without the sheltering protection which the healthy corporate body possesses by reason of its more profitable operations elsewhere in the state.

To permit the accomplishment of this objective, Pacific Greyhound contends, and the District Court and the Interstate Commerce Commission hold, that the hollow Golden Gate corporate shell should already be viewed as a "carrier", because it would be one if the transaction were consummated, and therefore that this is a situation in which one carrier, Pacific Greyhound, is acquiring control of another carrier, Golden Gate.

Section 5 should be interpreted in the light of the purposes which Congress sought to accomplish by it.

Except to carry out that purpose, the statute should not be construed so as to oust the jurisdiction of the state over operations which are almost completely intrastate."

B. The denial of the motion to amend.

Rule 15(a) of the Federal Rules of Civil Procedure specifically declares that the Courts shall be liberal in allowing amendments. The proposed amendment in this case did not abandon or modify the original ground on which the Interstate Commerce Commission order was challenged. It sought only to add further grounds of attack. It did not render void or useless any action previously taken by the parties or the Court. It was offered at the time of argument of the legal question which was the only point raised in the original complaint.

For all practical purposes, the situation is the same as if a plaintiff sought to amend his complaint after a ruling that he had not alleged facts sufficient to state a cause of action. Even before liberal rules of pleading like Rule 15(a) were adopted, the Courts almost automatically permitted amendments after sustaining a general demurrer.

There was no showing of prejudice to appellee, nor did the District Court base its denial on that ground. Rather, it held that the Court's power to allow amendment should not be used to permit the introduction of a completely new theory "without some showing of lack of knowledge, mistake or inadvertence . . . or some change of conditions. . . ."

This approach is a throwback to the long discredited idea that litigants should suffer from errors in judgment committed by their attorneys. It is not consistent with the modern view that a litigant should be permitted to present every basis of recovery or defense which he might have, subject only to the protection of the other party from unfair surprise or unreasonable delay.

The motion to amend in this case was made as a result of a reexamination of the matter after a settlement agreement had been reached between the unions and Pacific Greyhound and Golden Gate. This agreement was diametrically opposed to the contentions previously made by Pacific Greyhound and accepted by the Interstate Commerce Commission; and obviously it put a different light on the whole question of whether there was substantial evidence to support the public interest findings of the Interstate Commerce Commission. Reexamining the case in this new light, appellants' counsel concluded that they should have challenged the Interstate Commerce Commission order on the ground of insufficiency of the evidence as well as on the issue of jurisdiction.

The request to amend was made immediately upon the execution of the agreement with the unions, and at an early stage of the proceeding. The amendment would not have delayed final submission of the case for any long period of time, since it would have involved only the filing of the record before the Interstate Commerce Commission, the submission of the union contracts, and the presentation of argument.

It could hardly have delayed the case as long as the fourteen-month period during which the District Court had the motion to amend under consideration. In fact, had the amendment been allowed when offered, in February, 1956, the time which the Court devoted to argument of the motion to amend in April, 1956, could have been devoted to argument of the questions raised by the amendment, and in its decision a year later, in April, 1957, the Court could then have disposed of those questions on their merits and rendered a final decision on the entire action.

In these circumstances, the refusal to permit the amendment can hardly be supported on the ground of delay, and in fact the District Court did not rest its decision on that ground.

The furtherance of justice calls for full rather than partial litigation of disputes. Since no substantial hardship or prejudice to appellees was involved, the refusal to permit amendment was an abuse of discretion.

VII. ARGUMENT.

A. SECTION 5 RELATES TO CONSOLIDATIONS AND MERGERS, AND DOES NOT INCLUDE SPLIT-UPS.

This is the first case in which the Courts have been called upon to determine the applicability of Section 5(2) of the Interstate Commerce Act to split-ups of operations. The interpretation adopted by the lower Court ousts the jurisdiction of state regulatory commissions over the transfer of wholly intrastate motor carrier-operating rights issued by them, in situations

which fit neither the statutory language nor the economic problems which the statute was designed to meet.

1. The language of the statute does not support the lower Court's decision.

The plenary authority given to the Interstate Commerce Commission in Section 5 was never intended to embrace all transfers; rather, it was intended to apply only to transfers of operating rights in connection with the merger, consolidation, or unification of existing carriers—not to the split-up of an existing carrier into two or more subsidiaries, each of which obviously would possess only a portion of the economic resources of the mother unit.

The language of Section 5(2)(a)(i) of the Interstate Commerce Act is clear and unmistakable. It authorizes the Commission to give approval to five classes of transactions, as follows (italics added):

> (1) ". . . for two or more *carriers* to consolidate or merge their properties or franchises . . . into one corporation . . . ;"
>
> * * *
>
> (2) ". . . for any *carrier* . . . to purchase, lease, or contract to operate the properties . . . of *another;*"
>
> * * *
>
> (3) ". . . for any *carrier* . . . to acquire control of *another* . . . ;"
>
> * * *
>
> (4) ". . . for a person which is *not a carrier* to acquire control of two or more *carriers* . . . ;"
>
> * * *

(5) ". . . for a person which is *not a carrier* and which has control of one or more *carriers* to acquire control of another *carrier* . . ."

In each of the first three instances, *all* the parties to the transaction must be *carriers,* and the transaction is either a merger of two or more *carriers* or the acquisition of one *carrier's* property or operations by *another.* It is conceded that Golden Gate is not yet a carrier—a conclusion which is compelled by the definitions set forth in Sections 5(13) and 203(14). The proposed transfer, therefore, is not to a *carrier,* but only to an *expectant* or *would-be carrier.*

Only the fourth and fifth categories apply to non-carriers (which is Golden Gate's status), and then only if the non-carrier is to acquire control of another carrier or carriers. In this proceeding, the reverse situation exists, since the non-carrier (Golden Gate) is to be under the control of the carrier (Pacific Greyhound).

Thus, none of the provisions of Section 5(2) covers the split-up of a carrier's operations by transfer of a portion to a newly created corporation which is neither operating nor authorized to operate as a carrier.

That Congress was aware of the distinction between existing and prospective carriers is shown by Section 20a(1) of the Interstate Commerce Act, which provides (in connection with issuance of securities) that, as used in that section,

". . . the term 'carrier' means a common carrier by railroad . . . *or any corporation organized for*

the purpose of engaging in transportation by railroad . . ." (Italics added.)

2. The legislative history of Section 5 shows a Congressional policy of encouraging consolidation rather than subdivision of carrier operations.

The legislative history of Section 5(2) reveals even more emphatically that it was designed to provide encouragement to plans for consolidation and unification, and that Congress was not thinking of split-ups when it took the extraordinary step of ousting state jurisdiction over transactions falling within this section. The sweeping changes brought about by the Transportation Act of 1940 (54 Stat.L. 284) had been the subject of extensive study by Congressional committees and a Presidential group known as the Committee of Six, consisting of three railroad management and three railroad labor representatives. The nature and seriousness of the situation with which Congress was dealing are shown in the following excerpt from the report of the Senate Committee on Interstate Commerce (S.R. 433, 76th Congress, First Session, May 16, 1939, p. 1):

> "The bill, S. 2009, represents a sound, realistic, and carefully considered approach to the solution of one of the most grave problems which confronts the people and the Congress of the United States. The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos. With one-third of the railroad mileage already

> in bankruptcy or receivership courts and with another third tottering on the verge of bankruptcy, action must be taken to preserve not only the railroads but an adequate transportation system for this country."

Under the Transportation Act of 1920 (41 Stat. L. 456), the initiative in proposing consolidation plans had to come from the Interstate Commerce Commission. That approach had not proved fruitful, however, and as the railroad industry's financial condition steadily grew worse it finally became apparent, as this Court itself later observed, that

> "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidation. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger or consolidation* if . . . the proposed transaction met with certain tests . . . in which case they should become effective regardless of state authority." (Italics added.)
>
> *Schwabacher v. United States,* 334 U.S. 182 (1948).

The various House and Senate Reports all refer to Section 5 as a vehicle for expediting consolidations, mergers, unifications, and pooling arrangements in order to prevent sick carriers from dying and to enable weak carriers to strengthen each other. So urgent was the need, and so desperate the economic plight of the carriers, that Congress provided, in

Section 5(11), that a plan approved by the Interstate Commerce Commission could be put into effect without obtaining the approval which might otherwise be required from other federal agencies or from state agencies. See S.R. 433, *supra;* H.R. 1217, 76th Congress, First Session, July 18, 1939; H.R. 2016, 76th Congress, Third Session, April 26, 1940; H.R. 2832, 76th Congress, Third Session, August 7, 1940. See *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (appendix) (1954), for a summary of the legislative history of Section 5.

In explaining the then-existing law, the Senate committee report (S.R. 433, *supra*, p. 28) pointed out that at that time Sections 5(2) and 5(3)(a) of the Interstate Commerce Act directed the Interstate Commerce Commission to adopt a plan for consolidation of railroads, and that Section 5(4)(b) provided that the Interstate Commerce Commission

> "may approve mergers, consolidations, etc., with respect to railroads, upon the condition, among others, that they are in harmony with and in furtherance of the plan of consolidation adopted by the Commission.
>
> "Section 213 of the Motor Carrier Act, dealing with motor carriers, contains no provisions corresponding to those in Section 5, dealing with railroads, with respect to a plan for consolidation.
>
> "Section 49 of the bill makes no requirements with respect to a plan for consolidation to be made by the Interstate Commerce Commission. The elimination of this requirement is the most important change which would be accomplished

by the unification section of the bill. This change is recommended in the report of the Committee of Six (pp. 30-32), and has also been recommended by the Interstate Commerce Commission."

The report of the House Committee on Interstate and Foreign Commerce (H.R. 1217, 76th Congress, First Session, July 18, 1939) presented a substitute bill, in which Section 5 was amended in substantially its present form. That report includes the following explanations (pp. 6, 12):

"Consolidations, Pooling, and Control.

"The substitute bill proposes the repeal of existing provisions of the Interstate Commerce Act which require the Commission to take the initiative in drawing and proposing consolidation plans. The act would leave the carriers of various types free to propose consolidations but permit them to be made only with approval of the Commission and upon such conditions as it may find consistent with the public interest." (p. 6)

* * *

"Section 8. Pooling; Consolidations, Mergers, and acquisitions of Control in Case of Carriers by Railroad, Motor Vehicle, and Water.

"Section 8 amends section 5 of the present act—

"(1) By including in the pooling provision carriers by motor vehicle and water carrier. The present section deals only with agreements between carriers for the pooling of freight traffic and earnings of different and competing railroads. No change is made with respect to the findings that must be made by the Commission in each case as to the probable effect of such a

pooling arrangement upon service, operation, and competition. The assent of all carriers involved must be obtained as provided in the present law.

"(2) By repealing the provisions of existing law requiring the Commission to prepare and adopt a general consolidation plan.

"(3) By including in one section all the provisions of the Interstate Commerce Act with respect to consolidations, mergers, and acquisitions of control of all types of carriers. In addition to rail carriers and motor carriers, heretofore included under the old section 5 and section 213, water carriers are included, and express companies and forwarding companies are included for the first time. Section 213 is repealed. Certain special provisions therefrom are retained and included in the amended section 5." (p. 12)

If Congress had intended the extraordinary procedure of Section 5, with a complete by-passing of other federal agencies and state agencies, to apply to split-ups, it would most certainly have mentioned split-ups in the committee reports, if not in the statute itself. The reports use the terms "pooling", "consolidations", "mergers", and "unifications", but nowhere is there any reference, directly or indirectly to a "split-up" or to any other term suggesting the subdivision of an existing carrier into two or more separate entities.

It is apparent why split-ups were not mentioned. The problem was what to do with a very sick industry —one-third of the carriers already in the bankruptcy Courts and another third at the threshold. The solu-

tion was to encourage the carriers to gain strength by combining. So great was the need to expedite plans of consolidation that Congress adopted the unusual procedure of freeing the carriers from any restraints of state or federal law except for the requirement of a finding by the Interstate Commerce Commission that the plan was consistent with the public interest.

To say that Congress intended this same short-cut procedure to apply to split-ups of a single carrier into two or more separate carriers is to ignore the situation which gave rise to Section 5. This case itself rather dramatically illustrates how the Congressional purpose would be prostituted if Section 5 is held applicable. An obviously weak carrier, Golden Gate, would be carved out of an economically strong one and would be sent out into the transportation world to flounder for itself and, if need be, to die in the bankruptcy Courts and leave the public without service. On the basis of its showing (R. 17), Golden Gate's operating loss in one year would use up almost all the $250,000.00 cash capital and leave nothing at all for working capital.

If Golden Gate were presently conducting the operations in question, and if it were to go to the Interstate Commerce Commission with a plan for merger or consolidation with Pacific Greyhound, the proposal would fall squarely within the purpose and language of Section 5(2). But if the opposite is also true, then we must attribute to Congress the intent to provide special encouragement to a carrier to subdivide itself at the very time when Congress was pointedly placing

its faith in consolidations as the means of relieving carriers from critical economic distress.

3. The states should not be deprived of authority over local operations in the absence of clear-cut Congressional authority to do so.

The area of expropriation of state authority embodied in Section 5 should be defined narrowly, so as to permit accomplishment of the intended federal purpose without unnecessarily depriving the state of its jurisdiction. Since almost all of the operations involved here are intrastate, the state has the primary regulatory concern over them. The state Public Utilities Commission, having a much closer knowledge than the Interstate Commerce Commission of the nature and importance of these operations, should not be denied the power to make its determination as to where the public interest lies.

The difference between the state Public Utilities Commission's and the Interstate Commerce Commission's conclusions as to the public interest in this very situation is found in a comparison of this case with the decision of the state Public Utilities Commission in *Re Pacific Greyhound Lines and T. J. Manning*, 52 Cal. P.U.C. 2 (1952), in which the state Commission, after a six-day public hearing, refused to approve a transfer of Pacific Greyhound's local operations between San Francisco and Marin County to an operator who proposed to invest $200,000.00 in working capital. The state Commission found this to be inadequate. Yet the Interstate Commerce Commission in this case found $250,000.00 to be sufficient working

capital for an operation which included the Peninsula and Contra Costa operations, as well as Marin.

Perhaps the Interstate Commerce Commission was unduly concerned over the claim that Pacific Greyhound's interstate operations were being burdened by a loss in the local commute service. See, for example, the comments in the Interstate Commerce Commission's decision at R. 19-20, 25, and 28, where the Interstate Commerce Commission recites Pacific Greyhound's contention that the state Commission's rate policy "has required the subsidization of the services under these commutation fares by the revenue from the system-wide intercity operations" (R. 19) and that the separation should be approved "to alleviate the burden placed on interstate commerce through the California Commission's policy of requiring a subsidization of intrastate operations by revenues derived from interstate operations" (R. 25), and then states (R. 28):

> "As contended by applicants, we may not properly overlook the burden on the interstate operations of Pacific [Greyhound] which the proposed transaction would alleviate."

Since the real purpose of this whole proposal is admittedly (R. 25) to circumvent the state commission's policies relating to the intrastate rates—a subject over which the Interstate Commerce Commission has no authority whatsoever in the case of motor carriers—the Court should be particularly careful to prevent the misuse of a statute enacted for an entirely different purpose.

Even where the Interstate Commerce Commission does have authority over intrastate rates, as in the case of railroads under Section 13(4) of the Interstate Commerce Act (U.S. Code, Title 49, Section 13(4)), this Court has carefully limited the invasion of the state's authority. In setting aside the order of the Interstate Commerce Commission increasing railroad rates for suburban commuter service in the Chicago area, this Court made the following statement of principle in the recent case of *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Illinois*, ... U.S. ....., 78 S.Ct. 304, 307-8 (1958):

> "This case presents once again the problem of adjusting State and federal interests in the regulation of intrastate rates. These intrastate rates are primarily the State's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation.' *State of North Carolina v. United States*, 325 U.S. 507, 511, 65 S.Ct. 1260, 1263, 89 L.Ed. 1760. *Thus, whenever this federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must 'clearly appear.'*" (Italics added.)

Similarly, the Court declared, in the same case (78 S.Ct. at 309):

> "The limited and exceptional federal power asserted by § 13(4) over intrastate rates must be exercised with 'scrupulous regard for maintaining the [primary] power of the state in this field.' *State of North Carolina v. United States*, 325 U.S. 507, 511, 65 S.Ct. 1260, 1263, 89 L.Ed. 1760."

Even if the Interstate Commerce Commission had the direct authority to increase Pacific Greyhound's rates in this local service in order to alleviate a burden on interstate commerce, it could not take such action without first finding that the entire intrastate rate structure was inadequate. *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Illinois, supra.* The Interstate Commerce Commission made no such finding, nor could it have. The California Commission has always allowed Pacific Greyhound a reasonable profit on its total intrastate operations, which amounted to a 7.1% rate of return in its most recent decision. *Re Pacific Greyhound Lines, et al.,* 55 Cal. P.U.C. 641, 656 (1957).

What the Interstate Commerce Commission could not do directly, because of insufficient legal power as well as lack of factual basis, it should not be permitted to do indirectly by strained elasticity in statutory interpretation.

The increasing complexity of our economy and the consequent interdependence of various parts of the country makes necessary and inevitable an enlargement of the federal government's authority over matters previously thought to be of local concern only. But federal jurisdiction is not to be extended willy-nilly and regardless of need. The governmental philosophy reflected in the judicial statements just quoted calls for a limitation of the Interstate Commerce Commission's authority under Section 5 short of the situation presented here.

The economic vice of the holding that Section 5 applies is that the state Public Utilities Commission, which has the direct regulatory responsibility for protecting the public interest with regard to substantially all of the operations involved, is completely by-passed, and the determination of public interest is made by a body (the Interstate Commerce Commission) which has regulatory responsibility for only a negligible portion of the operations. This anomalous result could be suffered if it were an inevitable by-product of the consolidation and merger rules which Congress deemed necessary when enacting Section 5. But the grant of plenary authority to the Interstate Commerce Commission goes only as far as the special measures which were authorized to strengthen weak carriers in a sick industry, and no further.

4. The exclusion of this transaction from Section 5 would not create an area of non-regulation.

There is no basis for the suggestion in the opinion of the Court below that if Section 5 should be held inapplicable, Pacific Greyhound would be "free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission approval" (R. 116). The Interstate Commerce Commission would clearly have jurisdiction over the transfer of interstate operating rights under Section 212(b), which provides that "Except as provided in Section 5" interstate motor carrier operating rights may be trans-

ferred pursuant to rules and regulations prescribed by the Commission.

Section 5 clearly applies to the transfer of an operating right from an existing carrier to an existing carrier. If Section 5 also applies to the transfer of an operating right from a carrier to a non-carrier, on the theory announced in this case that carrier status is to be determined as of the *consummation* of the transaction, Section 212(b) would be deprived of any significant meaning and would be limited entirely to motor carrier cases involving no more than 20 vehicles (as to which Section 5 is specifically made inapplicable by subsection (10)). Moreover, on this same principle, Section 312 of the Interstate Commerce Act (U.S. Code, Title 49, Section 912), requiring Commission approval of operating rights of water carriers, would have no meaning whatsoever. Such a construction is contrary to the Interstate Commerce Commission's own decision as to the interrelationship of Section 5 with Sections 212(b) and 312.

Thus, in *United States Lines Company (Panama Pacific Line) Certificate Transfer,* 260 I.C.C. 355 (1944), the Commission held that Section 312, and not Section 5, was applicable to a transfer of a water carrier certificate from a carrier to a new corporation resulting from the merger of the carrier and its parent.

In *Atwood's Transport Line—Lease—John A. Clarke,* 52 M.C.C. 97 (1950), the Commission itself emphasized that Section 5 is concerned primarily

with mergers. In denying a motion by an intervening Greyhound carrier to revoke a certificate and cancel a lease of the operation, the Commission said (52 M.C.C. at 107-8, italics added):

> "The national transportation policy was not intended to eliminate the distinction between sections 5 and 212(b), as specifically set forth in those separate sections of the act. It was only necessary that the national transportation policy be kept in mind when the Commission prescribed the rules and regulations governing transfers of certificates and permits, its sole power under Section 212(b). *Section 5 is principally concerned with the bringing of two or more carriers under control or management in a common interest.* For those small carriers desiring to effect the transfer of a certificate or permit from one to the other, a specific exemption was provided in section 5(10), and other transfers of a certificate from a carrier to a person, not a carrier and not affiliated with a carrier, are not subject to Section 5. The intent of the Congress obviously was to provide a means whereby such transfers could be effected easily and without delay under such rules as the Commission deemed appropriate."
>
> * * *
>
> "It is for Congress to enact legislation, and if has seen fit to draw a definite line of distinction between transfers of certificates not involved in a transaction which is subject to section 5, and the control of two or more carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved."

Under well-established rules of statutory construction, Sections 5, 212(b), and 312 should be construed

in such a way as to give effect to each, and render neither "superfluous, void, or insignificant." And that cannot be done under the interpretation adopted by the lower Court.

Washington Market Co. v. Hoffman, 101 U.S. 112, 116 (1879);

Ex Parte The Public National Bank of New York, 78 U.S. 101, 104 (1928);

D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932).

It is to be noted that when Pacific Greyhound, Golden Gate, and the Greyhound Corporation filed their application with the Commission for transfer of the operating rights, they prayed for authorization under Section 5 *or under Section 212(b)* if Section 5 were deemed inapplicable.[1] Had the application been processed under Section 212(b) and transfer only of the interstate rights been authorized, we could not challenge the jurisdiction of the Commission; but in that event no transfer of the intrastate rights (which as a practical matter constitute almost the entire operation) could be made without first getting the approval of the state Public Utilities Commission.

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[1]The application is not a part of the record on appeal, but the prayer thereof reads as follows:

"WHEREFORE, Applicants pray that the Interstate Commerce Commission enter an order approving and authorizing such transaction, upon the terms and conditions, and with such modifications as it shall find to be just and reasonable; or, if it is found that the transaction is not one subject to section 5, but that it involves the transfer of a certificate or permit properly for consideration under the provisions of section 212(b), that it be accepted and determined under those provisions and the rules and regulations promulgated thereunder."

The lower Court's reliance on the administrative interpretation placed on Section 5 by the Interstate Commerce Commission overlooks the Commission's decisions just cited and attributes too much weight to several small, uncontested cases in which the law was stretched as a practical means of reaching results which were not being opposed. In the first of these, *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531 (1940), a single carrier operating in Missouri in both interstate and intrastate commerce was confronted with the problem arising from a holding of the Missouri Public Service Commission that a single entity could not operate as both a common carrier and a contract carrier. It sought to extricate itself from repeated arrests of its drivers and "to obviate continuing conflict with the Missouri Commission" by seeking a split-up authorization from the Interstate Commerce Commission under then Section 213 of the Interstate Commerce Act (which contained language similar to present Section 5 and was repealed when motor carriers were placed under Section 5 by the 1940 Act). Although no one opposed the application, the Interstate Commerce Commission expressed considerable doubt about the proposal, and authorized it only because it appeared to afford "the only practical solution for elimination of continued conflict with the Missouri authorities". (35 M.C.C. at 535.)

Similarly, there were no protestants in *Consolidated Freightways Inc.—Control—Consolidated Convoy Co.*, 36 M.C.C. 358 (1941), and *Takin—Purchase—Takin*

Bros. Freight Line, Inc., 37 M.C.C. 626 (1941); and there was not even a public hearing in *Gehlhaus and Hollobinko—Control*, 60 M.C.C. 167 (1954). Administrative decisions given under such circumstances hardly seem an appropriate foundation for an interpretation which would drastically curtail state authority over intrastate operations, particularly when they are different in principle from other decisions of the same administrative agency, as already indicated.

The holding of the lower Court is not consistent with the views expressed in *General Transportation Co., et al. v. United States*, 65 F.Supp. 981, 984 (D.C. Mass. 1946), which involved a transfer of a common carrier certificate from one carrier to another carrier. The order of the Interstate Commerce Commission authorizing the transfer under Section 5(2) was attacked on appeal on the ground that the transferor carrier had previously ceased operations and that Section 5(2) applied only to carriers actually conducting carrier operations. In rejecting this argument, the special three-judge Court said that the contention had merit except for the fact that, under other provisions of the Act, the holder of a common carrier certificate was by reason of that fact alone a carrier regardless of whether he was still operating. If the status of "carrier" requires either the possession of an unrevoked certificate or the conduct of actual operations, Golden Gate cannot qualify on either basis.

5. Cases under the Civil Aeronautics Act have no applicability to Section 5.

The lower Court leaned heavily (R. 115-6) on the construction placed by the Second Circuit on Section 408 of the Civil Aeronautics Act (U.S. Code, Title 49, Section 488), which at first blush seems to parallel Section 5(2) of the Interstate Commerce Act. *Pan American Airways Co v. Civil Aeronautics Board*, 121 F.2d 810 (CA 2, 1941).

There are significant differences between air and surface transportation, however, which must be considered in interpreting the respective statutes. Most striking of all is the difference in legislative philosophy in the area of monopoly and competition. The Congressional policy of promoting unification and lessening competition as to surface carriers, as clearly shown by the legislative history of the Transportation Act of 1940, is in sharp contrast with the Congressional fear that monopoly and lack of competition would retard the growth of air transportation. See Federal Aviation Commission Report, Senate Document 15, 74th Congress, 1st Session, January 30, 1935, and particularly Recommendations 9 and 13 (pp. 10-11), and the discussion thereof (pp. 61-2, 69-71, 245), for strong policy statements regarding the need to restrict common control of air carriers and of air carriers by other interests, through holding companies, interlocking interests, or other devices.

Similar views are expressed in the floor debates. See Congressional Record, Senate, May 12, 1938, 75th Congress, 3rd Session, pp. 6728-32, for the statements

of the authors of the two pending civil aeronautics bills, Senators Truman and McCarran, that their respective bills would prevent monopolies and restraints on competition and would require the Board to reject mergers and consolidations which would raise the danger of monopoly or restraint of competition. In these debates, both authors agreed that their bills should be amended by eliminating the qualifying words "unduly" and "unreasonably" in the provisions which, as then written, prohibited mergers which would "unduly" restrain competition or "unreasonably" jeopardize other carriers.

This basic difference in the approach which Congress applied on the one hand to a well-developed industry suffering from excessive competition and wasteful duplication, and on the other hand to an infant industry greatly in need of the stimulating effects of competition, is reflected in the statutory language itself. Section 5(2)(a) of the Interstate Commerce Act, designed to encourage consolidations, commences with words of invitation:

> "It shall be lawful, with the approval and authorization of the Commission . . ."

Section 408(a) of the Civil Aeronautics Act reflects the opposite policy in the negative tone of its introductory clause:

> "It shall be unlawful, unless approved by order of the Board . . ."

The situation in the *Pan American Airways Co.* case, *supra*, was control of an applicant for an air

carrier certificate by a water carrier—one of the very types of monopolistic controls which Congress specifically wanted the Board to restrict and closely regulate. To hold that Congress had not intended to give the Board jurisdiction over such a situation would have done violence to the pointed legislative history mentioned above.

Moreover, the consolidation and merger provisions of Section 408 specifically provide in subsection (b), U. S. Code, Title 49, Section 488(b), that

> ". . . if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier. . . ."

This language clearly shows an intent to treat an applicant who is not yet an air carrier as if it were already an air carrier *if it is controlled by a surface carrier*. Obviously, such a proviso would be unnecessary if carrier status were to be determined as of the consummation of the transaction. Congress unquestionably knew the difference between an *existing* and a *would-be* carrier. There is no comparable provision in Section 5 of the Interstate Commerce Act.

Finally, we have the inherent differences in the characteristics of air and surface transportation. Air carriage is more appropriate for long than for short distances, and of necessity is predominantly interstate rather than intrastate in nature. The lag in state regulation of air carriers, even in the larger states, is

a reflection of this fact. The interplay of state and federal regulation does not, therefore, present the same considerations in air transportation as are involved in the regulation of motor carriers. The area of exclusion of state authority over transfers of operating rights could well be larger as to air carriers than as to motor carriers consistently with the policy of preserving as much local authority as possible over local operations.

B. REFUSAL TO ALLOW THE PROPOSED AMENDMENT WAS AN ABUSE OF DISCRETION.

1. The amendment raised substantial questions of public importance.

The proposed amendment to the complaint challenges the Interstate Commerce Commission's finding that the split-off of the local operations is in the public interest. The importance of this question is apparent. The service is essential to a large segment of the commuting public which works in San Francisco and lives in the suburbs. The suburban areas have a combined population of more than 400,000 (R. 11). The annual revenue exceeds $3,500,000.00 (R. 15-16). The Marin County portion of this service was assumed by Pacific Greyhound as a means of relieving an affiliated carrier then performing the service. See dissenting opinion of the Court below, R. 120-2, which includes a lengthy excerpt from the decision of the state commission (*Re Pacific Greyhound Lines*, 42 Op. Order of Railroad Commission of the State of California 661, 668-9).

The grounds on which appellant sought to attack the Interstate Commerce Commission's findings and orders are set out at length in the proposed amendment (R. 75-8). There is no suggestion in the opinion of the lower Court that these are not substantial grounds, nor could such a contention validly be made. If the allegations of the amendment are true, the public has not been adequately protected against discontinuance of the operations, and Pacific Greyhound has obtained the Commission's authority to escape its obligations to the public on a record which contained insufficient factual support for such a result and which included representations to the Commission directly contrary to Pacific Greyhound's subsequent conduct.[2]

This is certainly a situation which should be determined by judicial review in the absence of compelling considerations for denial of review.

2. The lower Court failed to give effect to the liberal policy of amendment required by Rule 15.

The lower Court's denial of the motion to amend was based on the principle that an amendment which changes the theory of the case after it has been submitted on another theory should be allowed only on a showing of "lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (R. 118).

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[2]Including specifically the subsequent inconsistent testimony of Pacific Greyhound's Vice-President as to working capital requirements and the negotiation of a joint labor contract coupled with the unions' agreement to drop their appeal from the order, as related in the statement of the case section of this Brief.

It may be observed, in view of this description of the posture of the case, that the amendment simply added another theory to the case but did not in any way alter or abandon the original theory. Furthermore, the only judicial proceeding which had occurred was argument of the legal question of jurisdiction which the complaint raised. Nothing had occurred which the amendment would have rendered immaterial or even less important, nor had the time of the Court or of the parties been imposed upon. On the contrary, the jurisdictional question would have retained its full significance, and would have called for exactly the same attention by the parties and the same consideration by the Court under the complaint as amended as under the original complaint.

This is not, therefore, analogous to cases in which there has been a trial on factual issues, and thereafter an effort is made to raise new factual issues which might require further testimony from the same or additional witnesses, with consequent hardship to witnesses and imposition on the time of the court and the other parties.

Rather, this case is like the situation which frequently arises when a Court holds that the allegations of a complaint are insufficient to state a cause of action. Amendment is allowed as matter of course in such situations. In fact, the exact issue before the Court, when the motion to amend was made, was whether the complaint stated a cause of action, since the only question it raised was the jurisdiction of the Interstate Commerce Commission under Section 5.

To condition the right to amend under these circumstances on a showing of mistake, inadvertence, or excusable neglect is contrary to the specific requirement in Rule 15(a) of the Federal Rules of Civil Procedure that "leave shall be freely given when justice so requires."

The criteria applied by the lower Court are those which customarily govern relief from default judgments. See, for example, Rule 60(b) of the Federal Rules of Civil Procedure, and Section 473 of the California Code of Civil Procedure. The difference between the strict criteria for relief from a final judgment and the liberal policy governing amendments precludes the application of the mistake and inadvertence philosophy as the standard governing the allowance of amendments. While these same factors of mistake and inadvertence may properly be weighed by the Court in balancing the equities, they do not furnish a basis for denial of amendment in the absence of strong affirmative reasons for refusing leave to amend.

A mere recital of the chronology of this case shows that appellees could not have suffered from any delay in the presentation of the additional grounds alleged in the amendment. The complaint was filed on October 18, 1955 (R. 1). The United States and the Interstate Commerce Commission filed their joint answer on December 15, 1955 (R. 44). The intervenor appellees filed their notice of motion to intervene on December 29, 1955 (R. 49), which motion was granted without opposition on January 9, 1956 (R. 51). The

order designating the three-judge Court was entered on January 12, 1956 (R. 50-51). On January 23, 1956, the intervenors filed their notice of motion to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 67-8); on February 2, 1956, the United States and the Interstate Commerce Commission filed a notice of motion for judgment on the pleadings (R. 69); and on February 17, 1956, appellants as well as the labor unions who were then still parties plaintiff filed a notice of motion for judgment on the pleadings (R. 70-1).

All three motions raised exactly the same question, namely, did Section 5(2) apply? They were all noticed for February 23, 1956, and were argued on that day. In the meantime, on February 21, 1956, the labor unions who had originally joined appellants as plaintiffs had stipulated with appellees for a dismissal with prejudice as to them (R. 72-3), and the order of dismissal was presented to the Court and signed and filed on February 23, 1956 (R. 73-4). As previously noted, the proposed amendment to the complaint alleges that on February 21, 1956, Pacific Greyhound and Golden Gate entered into a joint contract with the labor unions (R. 76-7).

In view of the joint labor union contracts with both Pacific Greyhound and Golden Gate and the contemporaneous withdrawal of the labor unions from the action, appellants, at the time of argument of said motions on February 23, 1956, asked permission to amend the complaint (R. 117), and on February 28, 1956, filed their written motion to amend with the proposed amendment (R. 74-8).

It may be noted here that, if the proposed amendment had been included in the original complaint, the question of the applicability of Section 5 would still have been before the Court on appellants' motion for judgment on the pleadings and, whether argued on February 23, 1956, or later, would have required the same exhaustive briefing and argument which it received.

Appellants' motion to amend was opposed by all appellees (R. 92-111) and was argued orally on April 20, 1956 (R. 124).

Thus, the motion to amend was made less than two months after the intervention of the intervenors, who themselves had waited more than two months before requesting intervention and had waited another month before filing their motion to dismiss. Had the motion to amend been granted when made, the entire matter could have been argued and submitted at the hearing on April 20, 1956, which, instead, was devoted to arguing the motion. The only additional material to be presented to the Court under the amendment would have been the record before the Interstate Commerce Commission and the labor contracts.

Thereafter, the lower Court waited almost a year before announcing its decision on April 12, 1957 (R. 111-18), and a reading of the majority opinion suggests rather strongly that this lengthy consideration was related primarily to the question of the applicability of Section 5, not to the motion to amend. (Obviously, if the motion to amend presented an issue so troublesome as to require a year to decide, that factor

alone would have called for allowing rather than rejecting the amendment, in view of the liberal policy in favor of amendments set out in Rule 15(a).

It is clear, therefore, that the question of timeliness cannot justify the Court's refusal to permit amendment, nor did the lower Court place its denial on that ground. It should be noted, however, that even if timeliness were involved, there would still be no basis for the denial in the absence of prejudice to appellees.

Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (CA 2, 1945);

Markert v. Swift & Co., Inc., 173 F.2d 517 (CA 2, 1949);

Maryland Casualty Co. v. Rickenbaker, 146 F. 2d 751 (CA 4, 1944);

Atlantic Coast Line R. Co. v. Mims, 199 F.2d 583 (CA 5, 1952);

McDowall v. Orr Felt & Blanket Co., 146 F.2d 136 (CA 6, 1944);

Rogers v. Girard Trust Co., 159 F.2d 239 (CA 6, 1947);

Lloyd v. United Liquors Corp., 203 F.2d 789 (CA 6, 1953);

Armstrong Cork Co. v. Patterson-Sargent Co., 10 F.R.D. 534 (D.C. Ohio, 1950).

The case of *Lloyd v. United Liquors Corp., supra*, is typical. Plaintiff's counsel had stated, on argument of motions for dismissal and summary judgment in an anti-trust treble-damage action, that he wanted to reserve the right to amend. Thereafter, the Court granted the defense motions, and refused plaintiff per-

mission to amend the complaint. In reversing the order denying leave to amend, the Appellate Court emphasized the liberal policy of permitting amendments. Answering the argument that amendment of the complaint would have delayed final disposition of the case by the trial Court, the Appellate Court quoted with approval (203 F.2d at 793) the following language from *Dochler Metal Furniture Co. v. United States, supra,* at 135:

> "But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

In the *Maryland Casualty Co.* case, *supra,* the trial Court had denied leave to amend the complaint during the trial, for the reason that, with proper preparation of the case, plaintiff could have proposed the amendment before the trial. In rejecting this as a ground for denial, and holding that the amendment should have been allowed, the Appellate Court said (146 F.2d at 753):

> "The more important question for the court's consideration, at the time that the motion to amend was made, was the effect which it would have, if granted, upon the rights of the parties and the proper disposition of the business of the court."

Similarly, in *McDowall v. Orr Felt & Blanket Co., supra,* where the trial Court had refused leave to amend on the ground that the issues had been settled

at a previously-held pre-trial conference, the Appellate Court reversed with the following observation (146 F.2d at 137):

> "The only question which confronts us is whether appellant should have been permitted to file his amended complaint, and it is here unnecessary to discuss any legal or factual questions with regard to the content of the proposed amended pleading. Rule 15 of the Federal Rules of Civil Procedure provides that, in the circumstances disclosed in this case, a party may amend his pleading only by leave of court . . . 'and leave shall be freely given when justice so requires.' Subsection (a). The rule continues, confirms, and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored, where no prejudice or disadvantage was suffered by the opposing side."

The majority opinion of the lower Court makes no reference to any prejudice or hardship which the amendment would have imposed on appellees, nor did any of the appellees attempt to justify the denial on that ground in their motions to affirm filed with this Court prior to the order noting probable jurisdiction. The basis for the ruling advanced in the majority opinion and urged by appellees is that counsel for appellants concededly had considered the advisability of challenging the sufficiency of the evidence before filing their complaint and had decided not to do so, and that the subsequent effort to raise this issue was not, therefore, based on "lack of knowledge, mistake or inadvertence . . . or some change of conditions . . ." (R. 118.)

Such a rule would penalize a litigant for an error in judgment of his attorney. The liberal policy of Rule 15(a) precludes such a result. If counsel for one of the parties determines, on further evaluation of the case, that his client has another ground of relief, amendment should be allowed unless doing so would impose such hardship or prejudice on the other side as to overbalance the desirability of a full judicial hearing on all issues desired to be presented. Justice is not furthered by delimiting the issues without good reason.

The rule announced by the lower Court puts such a premium on the original pleadings as to force attorneys to inject into their pleadings every possible factual and legal theory of relief, regardless of the attorney's judgment at that time as to the validity of such theory. The "shotgun approach" of pleading a multiplicity of issues "for good measure rather than for good reason" is one which the Courts have sought to discourage rather than promote. See, for example, *Application of House*, 144 F.Supp. 95, 99 (N.D. Calif. 1956).

It is not purely coincidental that counsel for appellants asked leave to amend at the very time that appellees advised the Court of the agreement which Pacific Greyhound and Golden Gate had just negotiated with the labor unions. One of the important factors relied upon by the Interstate Commerce Commission in its determination of public interest was the claim of Pacific Greyhound that its labor-management relationships had been made especially diffi-

cult by the necessity of negotiating terms applicable to both local and long-line drivers in a single labor agreement (R. 21). After having persuaded the Interstate Commerce Commission to accept this argument, even though "strongly disputed by the union" (R. 21), Pacific Greyhound and Golden Gate thought so little of it as to enter jointly into agreements with the unions which, as alleged in the proposed amendment, provide that, if the proposed transaction is consummated, employees of Pacific Greyhound Lines and Golden Gate Transit Lines will be covered by the same employment contracts, and employees of Pacific Greyhound Lines who transfer to Golden Gate Transit Lines will have the privilege to transfer back to Pacific Greyhound Lines without loss of seniority (R. 76-7).

Conduct so startlingly contrary to the contentions which Pacific Greyhound had successfully urged before the Interstate Commerce Commission called for a re-evaluation of the entire question of whether there really was substantial evidence to support the public interest findings of the Interstate Commerce Commission. On such reconsideration, counsel for appellants concluded that they should urge the Court to review the sufficiency of the evidence and the propriety of the Interstate Commerce Commission's findings and of its order denying rehearing and reconsideration, as an additional ground for setting aside the order of the Commission.

The reluctance of the Courts to disturb discretionary rulings of administrative agencies is a guidepost

to litigants to refrain from asking for judicial review unless the abuse of administrative discretion or the lack of evidence is clearly apparent. The litigant must leave the determination of this question to his attorney, who, in turn, must rely heavily on his judgment. When review of the case later leads the attorney to a different conclusion, his client's right to raise the issue should be restricted only by considerations of fairness to both sides, and not by concepts of inadvertence, ignorance, or neglect.

To the extent that Pacific Greyhound might claim that even the brief delay which allowance of the amendment might have involved would have caused financial hardship with respect to its rate structure, the complete answer is that, under the latest fare increases authorized by the California Public Utilities Commission, Pacific Greyhound is allowed a generous rate of return of 7.1% on its rate base in its total California intrastate operations. *Re Pacific Greyhound Lines, et al.,* 55 Cal. P.U.C. 641, 656 (1957). Even before the motion to amend had been argued, Pacific Greyhound received a fare increase in the bulk of the local operations involved in this case, as stated in footnote 4 of the dissenting opinion (R. 123). See *Re Pacific Greyhound Lines,* 54 Cal. P.U.C. 675 (March 27, 1956), which authorized a substantial increase in fares in the Peninsula and Marin operations.

VIII. CONCLUSION.

The judgment of the lower Court should be vacated and the case should be remanded for entry of a judgment setting aside the order of the Interstate Commerce Commission; or, in the alternative, the lower Court should be directed to grant appellants' motion to amend their complaint and conduct such further proceedings as might be appropriate.

Dated, March 4, 1958.

Respectfully submitted,

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